IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL ANTHONY ELLIOTT, Appellant.	No. 37131-6-II UNPUBLISHED OPINION

Van Deren, C.J. — Michael Anthony Elliott[1] appeals his conviction for vehicular assault.[2] He argues that the trial court erred by denying his motion to suppress evidence of his blood alcohol level because the arresting officer did not have probable cause to arrest him for vehicular assault. We affirm.

FACTS[3]

On the evening of November 15, 2006, the Lacey Police Department received word of a

[1] The defendant's last name appears in the record as both "Elliot" and "Elliott." We refer to him as "Elliott," the name listed on many of the court documents.

[2] RCW 46.61.522.

[3] Elliott appeals only the trial court's probable cause determination at the CrR 3.6 suppression hearing on July 9, 2007. Therefore, we address the facts and law relevant to that hearing. Unless otherwise noted, all citations to the report of proceedings use that date.
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two car collision. Officer Jamie Newcomb, the first officer to arrive at the scene, found that one driver was injured. The other driver, Elliott, was distraught but uninjured. Elliott told Newcomb that he was driving northbound on a two lane road but swerved to the right and then to the left to avoid an oncoming vehicle. Travelling perpendicular to the roadway, Elliott's car hit the car driving in the southbound lane.

Officer David Johansen arrived shortly after Newcomb. Newcomb told Johansen what he learned from Elliott. The paramedics advised Johansen that the victim was in pain and that they believed she had a broken wrist. They also advised Johansen that they smelled alcohol on Elliott's breath. Based on this information, Johansen radioed for officer Ken Westphal, who was trained to recognize when individuals are impaired by drugs or alcohol, to investigate whether Elliott had been driving under the influence (DUI) of drugs or alcohol.

When Westphal arrived, he spoke to Elliott about the accident. According to Westphal, Elliott smelled of alcohol. He slurred his words when speaking and his eyes were red, droopy and watery. When Westphal asked Elliott if he had been drinking, Elliott replied that he had law enforcement experience and would only discuss the accident.

Westphal concluded that Elliott was under the influence of alcohol based on his "facial indicators, his characteristics, [and] the odor of alcohol." Report of Proceedings (RP) at 17. Johansen told Westphal that the paramedics were transporting the victim to the hospital to attend to her wrist. Westphal had intended to arrest Elliott for DUI but, after learning of the victim's likely broken bone, he arrested him for vehicular assault.

Westphal advised Elliott of his *Miranda*[4] rights and took him to the hospital for a

[4] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

mandatory blood draw. At the hospital, Westphal read Elliott the special evidence warning for vehicular assault and had a laboratory technician draw his blood. Elliott requested and received a second blood sample. His blood alcohol concentration level was 0.12 percent—above the legal limit of .08 percent. Former RCW 46.61.502 (1998). Westphal later received confirmation that the victim suffered a broken wrist.

The State charged Elliott with vehicular assault. Westphal and Johansen both testified at the CrR 3.6 hearing. The trial court concluded that Westphal had probable cause to arrest Elliott on the charge of vehicular assault. Accordingly, the trial court denied Elliott's motion to suppress the evidence of his blood alcohol level.

A jury convicted Elliott as charged. He appeals.

ANALYSIS

I. Probable Cause

Elliott argues that the arresting officer lacked probable cause to arrest him for vehicular assault. He argues that the officer had no authority to administer a mandatory blood test without probable cause and that the trial court erred in denying his motion to suppress this evidence. We disagree.

A. Standard of Review

"We review conclusions of law pertaining to suppression of evidence de novo." *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006). Here, the trial court made several findings of fact and concluded, "Westphal had probable cause to arrest . . . Elliot[t] for vehicular assault and was entitled to obtain [his] blood pursuant to the mandatory blood draw provisions of the implied

consent statute."[5] Clerk's Papers (CP) at 73-74.

Elliott assigns error to multiple findings of fact but fails to argue that the findings lacked substantial supporting evidence. "A party waives an assignment of error not adequately argued in its brief." *Milligan v. Thompson*, 110 Wn. App. 628, 635, 42 P.3d 418 (2002); *see* RAP 10.3(a). Thus, we consider these factual challenges waived and treat the findings as verities on appeal. *See Levy*, 156 Wn.2d at 733. Accordingly, we review his argument that the trial court erred in its legal determination that the officer had probable cause to arrest Elliott for vehicular assault.

[5] The trial court made the following findings of fact:

1. On the afternoon of November 15, 2007 Officer Ken Westphal responded to the scene of a two car accident on Carpenter Road SE.
2. Upon arriving at the scene, Officer Westphal was approached by Officer Johansen. Officer Johansen told Officer Westphal that a Lacey Medic had approached him and said he could smell an odor of intoxicants coming from Mr. Elliot[t]'s breath. Officer Johansen requested that Officer Westphal investigate Mr. Elliot[t] for driving under the influence.
3. Officer Westphal has been with the Lacey Police Department for 3 ½ years and is trained as a Drug Recognition Expert and has experience in determining whether individuals are under the influence of alcohol and/or other drugs. Officer Westphal approached Mr. Elliot[t] who told him that he had been driving Northbound and had to swerve to miss an oncoming car. Mr. Elliot[t] said that when he attempted to correct his car, the accident occurred.
4. During his contact with Mr. Elliot[t], Officer Westphal noticed the odor of alcohol coming from Mr. Elliot[t]'s breath and that he slurred his words slightly. He also noticed that Mr. Elliot[t] had red, watery and droopy eyes.
5. Officer Westphal asked Mr. Elliot[t] whether he had been drinking and Mr. Elliot[t] said he had not been drinking and that he would not do any field sobriety tests. At this point, Officer Westphal conferred with Officer Johansen who told Officer Westphal that the other driver had been transported to the hospital and that the medics believed she possibly had a broken wrist. Accordingly, Officer Westphal arrested Mr. Elliot[t] for vehicular assault. Officer Westphal invoked the mandatory blood draw provisions of the implied consent statute and later obtained blood from Mr. Elliot[t].

Clerk's Papers (CP) at 72-73.

B. Probable Cause for Vehicular Assault and Mandatory Blood Draw

"Probable cause exists when the arresting officer has 'knowledge of facts sufficient to cause a reasonable [officer] to believe that an offense has been committed' at the time of the arrest." *State v. Moore*, 161 Wn.2d 880, 885, 169 P.3d 469 (2007) (alteration in original) (quoting *State v. Potter*, 156 Wn.2d 835, 840, 132 P.3d 1089 (2006)). This determination is made in a "practical, nontechnical manner." *State v. Gillenwater*, 96 Wn. App. 667, 671, 980 P.2d 318 (1999). "A tolerance for factual inaccuracy is inherent to the concept of probable cause. . . . Probable cause requires more than suspicion or conjecture, but it does not require certainty." *State v. Chenoweth*, 160 Wn.2d 454, 475-76, 158 P.3d 595 (2007).

"Information obtained after the arrest may not be used to retroactively justify it." *State v. Gaddy*, 114 Wn. App. 702, 706, 60 P.3d 116 (2002), *aff'd*, 152 Wn.2d 64, 67, 93 P.3d 872 (2004). In circumstances where police officers act together as a unit, the "fellow officer" rule provides that the collective knowledge of all the officers involved in the arrest may be considered in determining whether probable cause existed. *State v. Nall*, 117 Wn. App. 647, 650, 72 P.3d 200 (2003).

A person is guilty of vehicular assault if, while driving a vehicle under the influence of drugs or alcohol, he or she causes substantial bodily harm to another person. *See* RCW 46.61.522(1)(b). The legislature defined "[s]ubstantial bodily harm" as "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, *or which causes a fracture of any bodily part*." Former RCW 9A.04.110(4)(b) (2006) (emphasis added).

Here, Westphal believed that the victim suffered a broken wrist but Elliott contends that

Westphal did not know whether the victim actually sustained a broken wrist and, therefore, (1) lacked probable cause to arrest him for vehicular assault and (2) had no legal basis to administer a mandatory draw blood. We disagree.

In Washington, drivers are deemed to give consent to breath or blood testing for drugs or alcohol if police have reasonable grounds to believe that the driver is intoxicated. Former RCW 46.20.308(1) (2005). Drivers who refuse consent face loss of their license and admission of the fact that they refused the test at a criminal trial. Former RCW 46.20.308(2)(a) and (b) (2005). But police may administer a blood test without a driver's consent if he or she is arrested for vehicular assault. Former RCW 46.20.308(3).[6]

An argument closely resembling Elliott's argument was rejected by Division Three of this court in *State v. Hill*, 48 Wn. App. 344, 345-47, 739 P.2d 707 (1987). Hill was convicted of vehicular assault after crashing into the victim's car head-on in 1985 causing, among other injuries, lacerations to the victim's face that were permanent, despite plastic surgery.[7] A responding officer arrested Hill for vehicular assault and had hospital employees take a blood sample over Hill's objections. *Hill*, 48 Wn. App. at 346.

On appeal, Hill argued that her mandatory, nonconsensual blood sample was

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[6] Subsequent amendments to RCW 46.20.308 (2005) are immaterial to the cited sections.

[7] In 1985, vehicular assault required "serious bodily injury" to a victim, meaning "injury which involve[d] a substantial risk of death, *serious permanent disfigurement*, or protracted loss or impairment of the function of any part of organ of the body." Former RCW 46.61.522(2) (1985) (emphasis added).

inadmissible because the implied consent statute[8] did not give officers discretion to arrest a defendant for DUI or vehicular assault. *Hill*, 48 Wn. App. at 349-50. Such a statutory interpretation would be unconstitutional, she argued, because police could arbitrarily determine whether suspects could invoke their right to refuse a blood test. *See Hill,* 48 Wn. App. at 349-50. But Division Three concluded that there was "no compelling reason to base the validity of a blood test obtained pursuant to [the implied consent statute] on the arresting officer's subjective belief as to what offense he thought should ultimately be charged, so long as there was probable cause to make an arrest for any of the three offenses described in the statute"—vehicular homicide, vehicular assault, or DUI with possibly fatal injuries. *Hill*, 48 Wn. App. at 350-51. Moreover, the court held that "[t]here is no constitutional right to be arrested for one offense rather than another; the only constitutional requirement is that there be probable cause to make an arrest."[9] *Hill*, 48 Wn. App. at 351.

Here, the victim complained of wrist pain following the accident. Paramedics treating her expressed concern that her wrist was broken and transported her to the hospital. The trial court found that paramedics "believed she possibly had a broken wrist" and that they told Johansen and

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[8] The 1985 version of RCW 46.20.308(3) is very similar to the 2005 version at issue here. The 2006 version lists three crimes for which police may administer a breath or blood test without an individual's consent: vehicular homicide, vehicular assault, and DUI where the victim suffers "serious bodily injury." Former RCW 46.20.308(3) (2005). The 1985 version required that the victim of a DUI suffer an injury with "a reasonable likelihood that [the victim] may die as a result of injuries sustained in the accident." Former RCW 46.20.308(3) (1985); *Hill*, 48 Wn. App. at 350. Here, this difference is immaterial.

[9] Elliott argues that an arresting officer must have a "specific factual basis upon which to believe the injury element of vehicular assault has been satisfied at the time of arrest" and likens these facts to cases where officers lacked probable cause after relying on informants, police dispatch, or police bulletins. But the officers here relied on paramedics at the scene, and *Hill* controls the trial court's probable cause determination in any event. *See* 48 Wn. App. at 350-51.

Westphal their belief. CP at 73. Like Hill, Elliott had no constitutional right to proof that the victim suffered substantial bodily injury before his arrest for vehicular assault. *Hill*, 48 Wn. App. at 351. And probable cause does not require officers to independently diagnose a victim's medical condition. Rather, paramedics usually make medical determinations and Westphal relied on their experience and expertise. Accordingly, we hold that the trial court did not err in concluding that the arresting officer had probable cause to arrest Elliott for vehicular assault or denying Elliott's motion to suppress evidence of his blood alcohol level.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, C.J.

We concur:

Bridgewater, J.

Penoyar, J.